ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF WISCONSIN.[2]

SUPREME COURT OF MISSOURI.[3]

SUPREME COURT OF MICHIGAN.[4]

SUPREME COURT OF KANSAS.[5]

ADMIRALTY. See *Errors and Appeals.*

AMENDMENT. See *Trial.*

BANKRUPTCY. See *Husband and Wife; Partnership.*

BILLS AND NOTES. See *Sunday.*

Endorser's Liability—Parol Evidence—Agency.—An endorser of a negotiable promissory note cannot escape liability to a subsequent endorsee for value and without notice, by showing that his endorsement was not made until after he had received the money for which the note was given, and that it was then made for the sole purpose of passing title to the endorsee, and under a verbal agreement with the agent of the latter that the words "without recourse" should be written over the endorsement: *Lewis* v. *Dunlap*, 72 Mo.

Endorsement by one not a Party—Proof that he is a Guarantor—Discharge of by failure to pursue Maker.—Where W., who apparently has no connection with the promissory note in question, sells and assigns the same before due, and endorses his name thereon in blank; and he is the first and only endorser of the note; and afterwards he is sued thereon by the person to whom he sold the same, and he sets up the following defence: That he sold and assigned the note before due, and endorsed the same as guarantor, and that at the time he sold the same, and at the time that the same became due, the maker thereof was perfectly solvent, and the note could have been collected from him by the exercise of reasonable diligence; but that afterwards the maker became insolvent; and that no notice was given to the defendant of the non-payment of the note until nearly four years had elapsed after the same became due, and was then given at a time when the note could not be collected from the maker because of his insolvency. *Held*, that the defence was sufficient; that want of due diligence on the part of the guarantee will discharge the guarantor to the amount of the loss sustained: *Withers* v. *Berry*, 25 Kans.

CONSTITUTIONAL LAW. See *Tax.*

Authority to City to subscribe to Stock—What Words do not give—Popular Vote—Cannot cure want of authority.—The constitution of a

---

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1880. The cases will probably be reported in 13 Otto.

[2] From Hon. O. M. Conover, Reporter; to appear in 52 Wis. Reports.

[3] From Thomas K. Skinker, Esq., Reporter; to appear in 72 Mo. Reports.

[4] From Henry A. Chaney, Esq., Reporter; to appear in 43 Mich. Reports.

[5] From A. M. F. Randolph, Esq., Reporter; to appear in 25 Kansas Reports.

state provided that the legislature should not authorize a city to become stockholder in a corporation, unless two-thirds of the qualified voters of such city, at a regular or special election, should assent thereto. Subsequently a charter was granted to a city, providing that it should have power to subscribe for stock in a railroad upon the vote of a majority of the resident taxpayers. *Held*, that read in connection with the constitutional restriction, the charter gave no power to subscribe for stock, but was only intended to add an additional restriction to that imposed by the constitution: *Allen* v. *City of Louisiana*, S. C. U. S., October Term 1880.

The fact that two-thirds of the qualified voters gave their assent would not validate a subscription by such city, the legislative authority to obtain the popular assent being as essential to the validity of the election as it is to the subscription: *Id.*

CONTRACT.

Interpretation of—Instruction to Jury—Expert Testimony entitled to weight.—In an action upon a contract to furnish stone enough to complete a certain bridge and its approaches, the question being, whether certain work found to be necessary upon the completion of the bridge, constituted part of the "approaches," it was error to refuse an instruction that, in determining what was intended to be embraced in the contract, the jury should consider what was the condition of things at the time it was made, and not the condition as developed by the operations of nature years afterwards: *Union Pacific Railroad Co.* v. *Clopper*, S. C. U. S., October Term 1880.

It was also error to refuse an instruction, that the testimony of experts, experienced in bridge building, was entitled to due weight as to whether certain work, spoken of as a dyke, was part of the bridge or approach: *Id.*

CRIMINAL LAW.

Practice—Right of Private Counsel for Prosecution to address Jury—Conduct of Jurors and Bailiff in charge of Jury—Threats by Son not evidence against Father—Allocution of the Judge in cases not Capital. —It is not error to permit an attorney assisting the state's attorney in the prosecution of a criminal case to make the opening statement to the jury. R. S. sect. 1908: *State* v. *Stark*, 72 Mo.

While it is improper for a juror in a criminal case to ask advice of the officer in charge of the jury in relation to the case, and equally improper for the officer to communicate such inquiry to the prosecuting attorney, yet if the officer made no response to the juror, and it is shown that the defendant was not in any way prejudiced, such inquiry of the officer and communication by him to the prosecuting attorney will furnish no ground for setting aside a conviction: *Id.*

In the absence of evidence of conspiracy between father and son, antecedent threats made by the son against the life of the defendant are not admissible in evidence on behalf of the defendant upon the trial of an indictment for an assault upon the father: *Id.*

On a conviction of an offence not capital, the omission to enter of record the allocution, or the formal address of the judge to the prisoner, asking him if he has anything to say why sentence should not be pro-

nounced against him, is not an error for which the judgment should be reversed: *Id.*

DEBTOR AND CREDITOR. See *Husband and Wife.*

DECEDENTS' ESTATES. See *Partnership.*

DONATIO MORTIS CAUSA.

Contract for the benefit of Wife.—One C., in anticipation of his own death, sold a carriage, agreeing with the purchaser that the price was to be paid in farm produce, to his (C.'s) wife. C. having died: *Held*, that his widow, and not the executor, was entitled to the benefit of the sale: *Scruggs* v. *Alexander*, 72 Mo.

EQUITY.

Election of remedy—Laches—Equitable remedy outlawed.—It seems, that bringing suit against only one of several persons to recover an entire sum received by him under a constructive trust, but divided with the others, should preclude separate suits against the rest, if the complainant had full knowledge of their interests when he elected to sue a particular defendant: *German American Seminary* v. *Kiefer*, 43 Mich.

Equity will not interfere where, with full knowledge of the facts, suit on a merely constructive trust has been delayed until many of the persons concerned in the transaction are dead, and the recollection of the others is such that the court must be in doubt whether the case established by the evidence is not partial and misleading; *Id.*

Courts of equity will not encourage the splitting of causes of action and needless litigation: *Id.*

An equitable action of assumpsit, if it lies at all, will be outlawed by the same lapse of time as bars an action at law, particularly if it rests on a merely constructive trust, and the defendant has always denied the equity and relied on an adverse claim: *Id.*

Relief against Mistake of Law when not Granted.—Mere ignorance of the law on the part of a party to a contract will not authorize a court of equity to set aside the contract. There must be something more. The attending circumstances must be such as to excite suspicion of fraud, imposition, misrepresentation or undue influence on one side, and imbecility, credulity or blind confidence on the other. Upon this principle, where it appeared that defendant had believed himself not legally bound to pay plaintiff's claim, but plaintiff's attorney had pressed him for payment, insisting that he was bound, and had prevailed upon him to execute a note for the amount, but it did not appear that he had relied upon the attorney's opinion, nor what were the considerations which induced him to accede to the attorney's demand, and there was no testimony tending to create a suspicion even of fraud, imposition, misrepresentation or undue influence; *Held*, that even if plaintiff's claim was originally unfounded, equity would not relieve defendant from payment of the note: *Dailey* v. *Jessup et al.*, 72 Mo

ERRORS AND APPEALS.

Jurisdiction—Amount in Controversy—Joint Salvage award—Apportionment among Salvors.—Where suit is brought by a number of

salvors to recover for a joint salvage service, and the whole amount awarded is sufficient to give the Supreme Court jurisdiction, the owners of the property saved will not be deprived of their appeal because the court below apportioned the recovery among the salvors according to their respective merits, and some received less than $5000: *Sinclair* v. *Cooper*, S. C. U. S., October Term 1880.

EVIDENCE.

Acknowledgment—Disputing Certificate.—Certificates of acknowledgment may be impugned by proof of fraud or duress, but not by a mere denial of the facts certified, made on oath by the party purporting to make the acknowledgment, and opposed by equally strong evidence in support of such certificate: *Johnson* v. *Van Velsor*, 43 Mich.

Foreign Law.—Foreign statutes should, when possible, be proved as provided for in the state laws and the acts of Congress, rather than by the testimony of a lawyer who has practiced within the jurisdiction where they are in force: *Kopke* v. *The People*, 43 Mich.

Statements of one Partner.—Where two persons are sued as partners, and the question of partnership is put in issue, the statements of one of such persons in the absence of the other, is not evidence against the other that they are partners: *Johnston* v. *Clements*, 25 Kans.

Telegram—Proof of—Secondary Evidence.—Where the controversy is not between the sender and the person to whom a telegram is addressed, and the contents of such message is material, the original message, if not lost or destroyed, must be produced, it being the best evidence; and in case of its loss or inability to produce it from other cause, the next best evidence the nature of the case will admit of must be furnished. If there is a copy of the message existing, it should be produced; if not, then the contents of the message should be shown by parol testimony: *Barons* v. *Brown*, 25 Kans.

Where the telegraph operator, having the possession of the books and papers of the office at C., testified there was not in his office any of the messages forwarded from the office on April 26th 1878, but he *supposed* all such messages had been destroyed, as it was the custom to destroy them after six months, and then presented a book of the office which he said he *supposed* was in the handwriting of the operator who preceded him at the office. *Held*, the preliminary proof was insufficient to authorize the introduction of secondary evidence of the contents of the message in question. *Held, further*, that as the only entry or memorandum in the book concerning the *supposed* destroyed message was as follows: "H. & B. to Q. M. & Co., Ks., nine words," such entry was inadmissible as original or other evidence. *Held*, also, as the book was not an account or shop-book, or any register or record recognised by law as evidence, it was error to admit it or the entries therein for the consideration of the jury, and its admission in this case, having been highly prejudicial to the defendants, is sufficient cause for the reversal of the judgment: *Id.*

If the original message could not be produced, and if no copy of such message existed, the person making such entries in the office book, when called upon to testify to the contents of the message, might have used

the book to refresh his memory concerning the messages sent from the office while he was operator: *Id.*

Written Contract—Parol Evidence to Explain.—Where a written contract is uncertain as to matters affecting the liabilities of the parties, parol evidence of the situation of the parties and of the subject-matter is admissible to aid in its construction: *Wilson* v. *Morse*, 52 Wis.

Where there is any uncertainty or ambiguity in a written contract, the construction subsequently put upon it by the parties themselves, as evinced by their conduct, may be shown to aid the court in construing it: *Id.*

EXECUTION.

Exemption—Stock in Trade—Failure to make Selection.—The statute which exempts from execution the "tools and implements, or stock in trade, of any mechanic, minor or other person, used or kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value" (subd. 8, sect. 2982, R. S.), *held* to apply to the stock of goods on sale by a merchant; *Wicker* v. *Comstock*, 52 Wis.

In general, where a debtor's whole stock in trade, exceeding in value $200, has been seized, his neglect or refusal to select the specific articles which he will retain as exempt, is a waiver of his right to the exemption; but if the officer refuses to give him an opportunity to make a selection, or denies his right to any exemption, the want of actual selection by the debtor will not be a waiver of his right: *Zielke* v. *Morgan*, 50 Wis. 560, distinguished: *Id.*

EXPERT. See *Contract.*

FRAUD. See *Husband and Wife.*

FRAUDS, STATUTE OF. See *Insurance.*

FOREIGN LAW. See *Sunday.*

GROWING CROPS. See *Mortgage*

HUSBAND AND WIFE.

Ante-nuptial Settlement—Validity of—Insolvency—Fraudulent Intent.—An ante-nuptial settlement made by an insolvent man in consideration of and as an inducement to the marriage, though intended by him to hinder and delay his creditors, is, in the absence of evidence that the wife was aware of the insolvency or of the fraudulent intent, valid as against his assignee in bankruptcy: *Prewit* v. *Wilson*, S. C. U. S., October Term 1880.

Divorce, as affecting Wife's Homestead Rights—Abandonment by Husband of his Family—Ejectment.—Divorce obtained by the wife will not deprive her of her homestead rights acquired during coverture in her husband's land, where she continues to reside upon it with her minor children: *Blandy* v. *Asher*, 72 Mo.

In the absence of evidence that a man who has abandoned his wife and children and has suffered a divorce from his wife, has since acquired a household elsewhere, a place which was his homestead at the time of the abandonment and continues to be the residence of his children and

their mother, will still, for the purpose of preserving the rights of the children, be treated as his homestead : *Id.*

A defendant in ejectment cannot claim under the Homestead Act land exceeding in value the statutory limit: *Id.*

Right of Wife to Elect against Will—Not barred by Release.—The widow's statutory right to elect the provision made for her by law in lieu of that made by will, cannot be taken from her either by the will or by a deed of release executed by her to her husband during the coverture : *Wilber* v. *Wilber*, 52 Wis.

Avoidance of Wife's Deed—Undue Influence—Unsupported Testimony of Wife.—Where a note and mortgage by husband and wife, and the certificate of acknowledgment of the mortgage by both, are perfectly fair and regular on their face, a defence against them by the wife on the ground that they were executed by her under undue influence and coercion on the part of the husband, and that she never in fact acknowledged the mortgage, can be sustained only upon perfectly clear, convincing and satisfactory evidence ; in general, the unsupported testimony of the wife alone will not be regarded as sufficient: *Smith* v. *Allis*, 52 Wis.

INSURANCE.

Parol Policies—Parol Variation of Written Contracts.—Insurance policies are not required by law to be in writing, and outside of the Statute of Frauds there is no rule of law which prevents written contracts from being changed by parol: *Roger Williams Ins. Co.* v. *Carrington*, 43 Mich.

INFANT. See *Parent and Child.*

INTOXICATION. See *Negligence.*

JUDGMENT.

Not Enjoined for Fraud of Complainant's Attorney.—A judgment will not be set aside or enjoined at the instance of the losing party, on the ground that he had intended to appeal from it, but was prevented from perfecting his appeal through the fraudulent conduct of his own attorney, unless it distinctly appears that the complainant was damnified by the failure to perfect the appeal: *Dobbs* v. *St. Joseph Fire & Marine Ins. Co.*, 72 Mo.

LIMITATIONS, STATUTE OF. See *Tax.*

Proof of Credits Avoiding.—When the Statute of Limitations is relied on as a defence to a note, the plaintiff should not be permitted to read in evidence credits endorsed on the note, without first proving when the endorsements were made. When it is shown that they were made at a time when it was against his interest to make them, or that they were made by or with the consent of the payor, they will be admissible, but not if they were made by the holder himself without the knowledge or consent of the payor, and there is no other proof that the payments were then made: *Goddard* v. *Williamson's Admr.*, 72 Mo.

What not sufficient Promise to Bar.—The written words, "I think I see my way clear to pay you the $200 and interest I owe you, * * * I am in hopes another two years will enable me from my present income to clear off all pressing debts. * * * Rest assured that not a day of pecuniary freedom will pass over my head without your hearing from me," *held*, not to contain any promise of payment sufficient to remove the bar of the Statute of Limitations: *Pierce* v. *Seymour*, 52 Wis.

Mortgage.

Personal Property—Sale by Mortgagee—No Warranty of Title—When Notice of Sale not Requisite.—Where a mortgagee of personal property sells the property not as his own, but held by him as a mortgagee, he does not warrant the title. The rule of *caveat emptor* applies to all persons desiring to purchase under such circumstances; and the purchaser under such circumstances obtains only the interest of the mortgagor and mortgagee in the property: *Harris* v. *Lynn*, 25 Kans.

A mortgagee of personal property may sell his own and the mortgagor's interest in the property, with the consent of the mortgagor, without giving public notice of the sale: *Id.*

And when the mortgage contains a provision that the mortgagee may sell the property after condition broken, or if at any time he should deem himself unsafe, he may sell the property at public or private sale previous to the time above mentioned; *held*, that no notice is required, and that a sale without notice will transfer to the purchaser all the interest, both of the mortgagor and mortgagee, in the property: *Id.*

Removal of Growing Crops after Foreclosure.—A foreclosure deed to the mortgagee gives him the same estate as a foreclosure of the equity of redemption, and is as effective as against the owner of the equity as if executed by such owner; *Ruggles* v. *First National Bank of Centreville*, 43 Mich.

Growing crops pass with the soil under foreclosure deed, and on proper application the court may perhaps provide for their preservation until possession is given to the purchaser: *Id.*

Negligence.

Contributory—Intoxication—Evidence.—In an action for injuries from negligence, if the person injured was, at the time of the injury, intoxicated in any degree, the fact is proper to be considered by the jury in determining the question of contributory negligence; and a judgment for plaintiff is reversed for an instruction to the effect that "the fact of intoxication alone" would not "prove contributory negligence," unless the proof showed such a degree of intoxication that "imbecility would begin to affect" the intoxicated person—such instruction being regarded as liable to mislead the jury: *Fitzgerald* v. *Town of Weston*, 52 Wis.

Parent and Child.

Custody of Child—To whom Awarded.—It is the duty of a court whenever the possession and custody of minor children is sought by habeas corpus, to make such order for their care and custody as the best interests of the children may require, and to that end may commit them to the custody of other than a parent, and this notwithstanding the fact

that in a decree of divorce they were committed to the care and custody of either father or mother. Such a decree may bind the parents *inter sese*, but does not conclude the court as to the best interests of the children: *In the Matter of Bart*, 25 Kans.

PARTITION.

Sale after Expiration of Order of Sale is Void.—An order of sale in partition expires with the term at which the sale is required to be made, and if for want of bidders, no sale takes place at that term, a renewal of the order must be procured before any further steps can be taken. A sale at a subsequent term without such renewal is void: *Hughes* v. *Hughes*, 72 Mo.

PARTNERSHIP. See *Evidence*.

Partnership Accounting—Disposition of Lands—Partition.—Lands that are part of a common partnership stock have in equity the character of personalty; and the legal title thereto is subordinated to the incidents of partnership funds and accounting: *Godfrey* v. *White et al.*, 43 Mich.

Proceedings between partners for an accounting are always for the principal purpose of reaching a statement of money balances and a division of assets as personalty, and being essentially a personal and not a real controversy, may be carried on in courts within whose jurisdiction the parties live and do business, irrespective of the location of the partnership lands: *Id.*

Provision in Will of Partner for Continuance of—Extent of Liability—Subsequent Dividends to Legatees—Assignee in Bankruptcy.—A testator may authorize the continuance of a partnership in which he was engaged without subjecting any more of his property to the vicissitudes of the business than what was embarked in it at the time of his death, and if dividends honestly and fairly made and which do not diminish the capital of the concern, are afterwards paid to his legatees under the provisions of his will, such dividends cannot, upon the subsequent bankruptcy of the firm, be recovered back by the assignee in bankruptcy: *Jones* v. *Walker*, S. C. U. S., October Term 1880.

PUBLIC OFFICER. See *Surety*.

RAILROAD.

Damages for Land taken—Portion of Tract.—Plaintiff appealed from the decision and award of the commissioners as to the appraisement of value and assessment of damages for the right of way of the Kansas City E. & S. Railroad Company's railroad, through and across a certain quarter section of land belonging to him. He was the owner of three hundred and sixty acres, lying in a body and used for the purpose of a stock-ranch. The railroad ran nearly diagonally through one quarter section, and cut off the water, timber, the house and corrals from the main body of land, but did not touch the other quarters of the ranch. A regularly laid out public highway separated the quarter through which the railroad ran from one whole section. *Held*, the landowner, on the appeal, was entitled to recover the damages for the injury to the whole property, and not merely for that to the separate

quarter over which the railroad was built: *Kansas City E. & S. Railroad Co.* v. *Merrill*, 25 Kans.

Sheriff's Sale.

Relief against Mistake—Action against Defendant in Execution.—The doctrine of *caveat emptor* does not apply to sheriff's sales where there is a mistake made both by the sheriff and the purchaser, in selling a tract of land to which the defendant in the execution has no title. In such case, since the consideration for the money paid on the execution has failed, and the money has gone to extinguish the defendant's debt, the purchaser may recover it back from him; and it is not essential that the purchaser shall have made improvements upon the land (as was the case in *McLean* v. *Martin*, 45 Mo. 393); it is enough if the money has passed out of the sheriff's hands before the mistake is discovered: *Wilchinski* v. *Cavender*, 72 Mo.

Salvage. See *Errors and Appeals.*

Sunday.

Sunday Note.—A note made on Sunday is not void at common law, and in a suit on a foreign note any foreign statute invalidating it must be proved: *O'Rourke* v. *O'Rourke*, 43 Mich.

Surety.

Public Officer—Judgment Against not Conclusive on Sureties.—An order or judgment of amercement against a sheriff is only *prima facie* and not conclusive against his sureties: *Fay* v. *Edmiston*, 25 Kans.

In an action against the sureties the question is not, whether the judgment against the sheriff was obtained by fraud, collusion or mistake, but whether, upon the facts as they really existed, there was any liability. The judgment is *prima facie* evidence of the truth of the charges, but those charges are open to inquiry. The question is not how the judgment against the sheriff was obtained, but ought it, upon the facts, to have been obtained. Was there in truth a breach of the bond: *Id.*

Unauthorized Extension of Time by Bank—Surety not discharged.—Where a promissory note, upon which three persons are liable—one as principal debtor, and the other two as sureties—is placed by the owner thereof in a bank for collection; and, after the note has become due, an agreement is made between the officers of the bank and the principal debtor, that, in consideration of the sum of $40, to be paid to the officers of the bank, to be applied in part payment of the amount due on the note, and in consideration of the further sum of $1, to be paid to the officers of the bank for their time and trouble in doing the business, the time for the payment of said note should be extended for some months, and said sums are paid, and the time for the payment of the note is, in consideration thereof, extended in accordance with the said agreement, and said officers had authority from the owner of the note to extend the time for the payment thereof upon receiving a partial payment of the amount due thereon, but did not have authority to extend the time for such payment upon any other consideration whatever, and said extension of time of payment was without the knowledge or consent of

the sureties, and the agreement to receive the said $1, and the reception thereof, was without the knowledge or consent of the owner of the note. *Held*, that this extension of the time for the payment of the note did not release the sureties: *Prather* v. *Gammon*, 25 Kans.

TRESPASS.

Trespass for cutting Timber—Passage of Title.—Under a contract transferring all the pine trees the vendee "may choose to take," the latter agreeing to pay a certain sum "for the said pine so cut," &c., title did not pass until the pine was cut, and until then the vendee had neither actual nor constructive possession, and could not bring trespass for damages against a grantee of the vendor who had cut timber on the land: *Pfistner* v. *Bird*, 43 Mich.

TAX.

Statute of Limitations—When it commences to run against Tax Titles—Interest.—The date of the recording of the tax deed is the time at which the Statute of Limitations begins to run in tax title cases, and this time is not changed by the fact that the holder of the tax sale certificate did not obtain and record his deed on the day he was legally entitled to it: *Estes* v. *Stebbins*, 25 Kans.

The provision requiring fifty per cent. interest upon a redemption from a tax sale is not unconstitutional: *Id.*

TRIAL.

Submission to Court without a Jury—Subsequent Amendment of Narr. —Refusal to Vacate Submission—Discretion of Court.—Where a case has been submitted to the court without a jury, and at the close of the testimony plaintiff asks and obtains leave to amend his declaration, it is within the discretion of the court to grant or deny a motion of defendant to vacate the submission and allow a jury trial, and where neither the nature of the case nor the real issue is changed by the amendment a refusal of such motion, is not ground for reversal: *Bamberger* v. *Terry*, S. C. U. S., October Term 1880.

VERDICT.

When Sufficiently Certain.—In an action upon an insurance policy, a verdict for the full amount of the policy, with six per cent. interest and ten per cent. damages for vexatious delay (the latter imposed by statutory authority), is sufficiently certain without stating the figures; the amount of the policy, and the date from which interest is to be calculated, being shown by the proceedings and the amount of the judgment to be entered being, therefore, ascertainable by a simple arithmetical calculation: *Relfe* v. *Wilson*, S. C. U. S., October Term 1880.

WAREHOUSEMAN.

Issuing of Receipts by—Title of Depositor not Guaranteed.—A warehouseman, issuing warehouse-receipts for goods deposited, is not a guarantor to the assignee of the receipt, of the title of the depositor to the goods: *Mechanics' and Traders' Ins. Co.* v. *Kiger*, S. C. U. S., October Term 1880.